Supreme Court, U.S.
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No. 99-864

In The

Supreme Court of the United States

RICHARD ACKERMAN, TIMOTHY BOOKER, ERICH BUTLER, MICHAEL DICKSON, EDWARD DONAHOE, MICHAEL FABIAN, STEVEN JONES, RICHARD LOOS, MARK MARES, ROBERT MOON, JAMES MUELLER, DANA ROE, KIM SMITH, PAUL SPIELMAN, ALAN TAMONDONG, and BRAD VELLIQUETTE,

Petitioners,

v.

COCA-COLA ENTERPRISES INC., a Delaware corporation in good standing and licensed to do business in Colorado,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Respondent disagrees with the *Questions Presented for Review* by the Petitioners. Respondent presents the proper Question for Review, based upon Petitioners' petition for a writ of certiorari, as follows:

> Whether the Tenth Circuit Court of Appeals correctly determined that certain duties performed by Petitioners were performed incidental to and in conjunction with their own sales, for purposes of the outside salesman exemption to the Fair Labor Standards Act. *See* 29 U.S.C. § 213(a)(1); 29 C.F.R. § 541.5; 29 C.F.R. § 541.500, et seq.

LIST OF PARTIES TO THE PROCEEDING

Respondent has no parent companies. Pursuant to Supreme Court Rule 29.6, Respondent states that the following are the non-wholly owned subsidiaries and cooperatives of Respondent:

Coca-Cola Bottling Company of Johnson City
RE Services Holding Company, L.P.
Coca-Cola Enterprises (France)
Immo Dynamica (Belgium)
Immo Willems (Belgium)
Western Container Corporation
Southwest Canners, Inc.
Southeastern Container, Inc.
Gulf States Canners, Inc.

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STATEMENT OF JURISDICTION

The order and opinion of the Tenth Circuit Court of Appeals overruling the United States District Court for the District of Colorado was entered on June 10, 1999. *Ackerman v. Coca-Cola Enterprises Inc.*, 179 F.3d 1260 (10th Cir. 1999). Petitioners originally filed their petition for a writ of certiorari on September 8, 1999, although it was rejected as procedurally deficient. Petitioners refiled their petition and it was docketed on November 22, 1999.

Respondent acknowledges that if the case below otherwise presented a proper case for certiorari, jurisdiction would be proper under 28 U.S.C. §1254(1); but Respondent denies that Petitioner presents a proper case for certiorari.

STATEMENT OF THE CASE

Petitioners were employees of Respondent, and admit that they were primarily engaged for the purpose of making sales. The only question decided by the Court of Appeals was whether Petitioners were performing work "incidental to and in conjunction" with their sales, within the meaning of the laws defining the "outside salesman" exemption to the minimum wage and overtime provisions of the Fair Labor Standards Act ("FLSA"), when they performed "merchandising" duties. The Court of Appeals held that they were, and that Petitioners were therefore exempt. Petitioners do not directly challenge any of the factual assertions made by the Court of Appeals. For purposes of consideration of the petition for a writ of certiorari, Respondent will likewise accept the

factual and procedural assertions made by the Court of Appeals.

ERRORS IN PETITIONERS' STATEMENT OF THE CASE

Respondent agrees that the majority of the material facts in this case are undisputed: primarily, that "Petitioners were employed by the Respondent as salesmen. They were hired to perform sales activities." (Petitioners' Brief p. 10). The parties agree that Petitioners were employed for the purpose of selling Respondent's products and that they were regularly and customarily engaged in that activity away from Respondent's offices. (Petitioners' Appendix A, Court of Appeals Opinion p. 8).

Petitioners' statement that "Respondent stipulated at trial that petitioners engaged in non-exempt work in excess of twenty percent (20%) of petitioners' work week" is incorrect. (Petitioners' Brief p. 10). This statement does not reflect the actual stipulation entered by the parties. It was never stipulated that the work in question was non-exempt: the stipulation was that *in certain work weeks* the Petitioners would spend in excess of 20% of the time spent by non-exempt merchandisers performing merchandising tasks. (Petitioners' Appendix B, District Court Opinion p. 6). In other words, that in some weeks they performed work that, when performed by *other* employees, was non-exempt. The purpose of the stipulation was to set forth the work in question and thereby focus the inquiry on whether these tasks, *when performed by Petitioners,* were or were not exempt.

Petitioners' statement that "it was undisputed at trial that the Petitioners spent up to sixty-five percent (65%) of their time performing non-exempt work" is similarly incorrect. (Petitioners' Brief p. 10). Again, the issue is *whether* the work in question is or is not exempt, as being incidental to and in conjunction with sales when performed by Petitioners. At trial, the three Petitioners who testified as representative of all the Petitioners each testified that their direct sales activities comprised the majority of their work time. (*See* Petitioners' Appendix B, District Court Opinion p. 9, fn. 5). The remaining Petitioners had asserted that they spent varying amounts of time in merchandising versus direct sales activities, but only one of them asserted he could spend as much as 65% of the time merchandising. (Petitioners' Appendix B, District Court Opinion p. 9, fn. 5). The Court should thus reject Petitioners' oft repeated – and untrue – factual assertion that Petitioners spent "up to 65% percent" of their time in "non-exempt" work.

Petitioners' argument that the Court of Appeals' opinion could allow an employer to require an employee to perform "non-exempt work" up to ninety-nine percent of the time and still claim the outside salesman exemption is senseless. Under the law, a person who is not "employed for the purpose of" and who is not "customarily and regularly engaged . . . in . . . making sales" will never be an outside salesman, even if they make an occasional sale. Petitioners' overstatement highlights the weakness of their argument based on the facts of this case: Petitioners admit that they were regularly and customarily engaged in outside sales and that making sales was in fact their primary purpose, and agree that their

performance of merchandising activities increased sales. (*See* Petitioners' Appendix A, Court of Appeals' Opinion pp. 16 to 17; Petitioners' Appendix B, District Court Opinion p. 9). What more "plain and unmistakable evidence" that the merchandising duties in question are incidental to and in conjunction with their sales could there be?

FACTUAL ERRORS IN PETITIONERS' ARGUMENT

Respondent must address yet another error presented as "fact" by Petitioners. They repeatedly assert that the district court found they would spend "over forty-six hours a week" performing duties which were also performed by non-exempt employees. (Petitioners' Brief pp. 13, 15, 16). This is a misstatement: although the district court found that Petitioners' hours ranged from "an average low of fifty-five hours per week to an average high of seventy-two hours per week," (Petitioners' Appendix B, District Court Opinion p. 6, fn. 4), there was no finding that they performed merchandising duties "over forty-six hours" a week. Rather, the district court's actual finding was that they performed such duties anywhere from twelve hours to a potential high of forty-one hours in a given week, depending. (Petitioners' Appendix B, District Court Opinion pp. 9 to 10, fn. 5). In support of their request for a writ of certiorari, Petitioners simply keep repeating their erroneous statement of the district court's factual findings. Petitioners' tactics, however, should not be rewarded.

SUMMARY OF THE ARGUMENT

Petitioners do not present a sufficient ground to grant a writ of certiorari, because Petitioners assert no more than an alleged misapplication of a properly stated rule of law to the facts. The Court of Appeals properly held that Petitioners, who admit that they were engaged for the purpose of making sales and that their primary duty was sales, performed merchandising duties incidental to and in conjunction with their primary duty and were therefore exempt as outside salesmen. The Court of Appeals' interpretation of the regulations and guidance of the United States Department of Labor, which is specifically charged with defining the exemption, was well considered and not inconsistent with any other judicial ruling. Petitioners were exempt from the overtime requirements of the FLSA.

ARGUMENT: REASONS FOR DENYING THE WRIT

A. Petitioners do not present a sufficient ground for the United States Supreme Court to grant a writ of certiorari; Petitioners assert no more than an alleged misapplication of a properly stated rule of law.

Petitioners cite no conflict between the decision of the Tenth Circuit Court of Appeals in this matter and the decision of another United States court of appeals or a state court of last resort. Nor do Petitioners cite an important question of federal law that has not been, but should be, settled by this Court, or that has been decided in a way that conflicts with relevant decisions of this Court:

resolution of the issue of whether merchandising tasks are incidental to and in conjunction with sales when performed by an individual who admits that he or she is primarily employed for the purpose of making sales, and who admits that performing merchandising tasks furthers those goals, is not a question which should be settled by the United States Supreme Court, especially in the absence of any conflict among the United States courts of appeals on the issue.

Petitioners do not challenge the validity of the regulations of the Secretary of Labor. Nor do they challenge the fact that the Court of Appeals relied on the regulations and guidance of the Secretary of Labor. Rather, they assert that the Court of Appeals' application of the regulations and guidance created an unsatisfactory result. However, alleging a misapplication of a properly stated rule of law is rarely a sufficient ground for the granting of a writ of certiorari. *Supreme Court Rule 10.* In the present case, there are no compelling reasons for the Court to grant a writ of certiorari.

B. The Court of Appeals properly held that Petitioners, who admit that they were engaged for the purpose of making sales and that their primary duty was sales, performed merchandising duties incidental to and in conjunction with their primary duty.

The Secretary of Labor is specifically charged with the duty to "define and delimit" the term "outside salesman" in the FLSA. 29 U.S.C. §213(a)(1). The regulations promulgated by the Secretary of Labor are therefore to be given a high level of deference by the courts. *Chevron*

U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984); *Reich v. Parker Fire Protection Dist.*, 992 F.2d 1023, 1026 (10th Cir. 1993). They "are entitled to judicial deference and are the primary source of guidance for determining the scope of exemptions to the FLSA." *Spradling v. City of Tulsa*, 95 F.3d 1492, 1495 (10th Cir. 1996). Similarly, the Secretary of Labor's interpretive guidelines interpret and explain the regulations. Because they are well considered and the reasoning is sound and consistent, the interpretive guidelines are persuasive on issues regarding the FLSA. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Parker Fire Protection Dist.*, 992 F.2d at 1026. Therefore, the Court of Appeals was correct in deferring to the Secretary of Labor's regulations and guidance on the outside salesman exemption.

The only issue decided by the Court of Appeals was whether "merchandising" tasks, when performed by Petitioners, were "incidental to and in conjunction with" their sales of Coca-Cola products. (Petitioners' Appendix A, Court of Appeals' Opinion p. 10). If they were, then the 20% limitation on "non-exempt" work which is part of the criteria for the outside salesman exemption to the minimum wage and overtime requirements of the FLSA was not exceeded, and Petitioners were exempt. If they were not, then the limitation was exceeded and Petitioners were not exempt outside salesmen. 29 C.F.R. §541.5. The Court of Appeals concluded that, based upon the implementing regulations and interpretive guidance of the Secretary of Labor, Petitioners performed merchandising duties incidental to and in conjunction with their own outside sales, and therefore satisfied the outside salesman exemption.

Petitioners cannot point to a single instance where the Court of Appeals diverged from or failed to apply the plain meaning of the regulations in rendering its opinion. Petitioners do not cite a single authority which supports their position that the Court of Appeals' opinion is inconsistent with the intent of the FLSA and the implementing regulations. Petitioners do not challenge the validity of the regulations themselves. Rather, they essentially argue that the regulations, when applied by the Court of Appeals to their case, created an unsatisfactory result.

Petitioners argue that the Court of Appeals "focused exclusively on whether the 'salesman' executed the sale and ignored his overall job responsibilities." (Petitioners' Brief p. 14). They argue that its perceived "emphasis on taking the order" is not proper. (Petitioners' Brief p. 15). Quite the contrary: the Court of Appeals focused on the undisputed fact that Petitioners were primarily employed for the purpose of making sales. In determining whether merchandising duties were incidental to and in conjunction with this purpose, the Court of Appeals properly looked to the regulations of the Secretary of Labor, which specifically contemplate that such duties, when performed by the individual who actually makes the sale, are exempt activities. 29 C.F.R. §541.504, §541.505. The Court of Appeals' determination was consistent with prior interpretations of the outside salesman exemption, which have noted that time spent in a particular task does not determine whether that task is incidental to and in conjunction with sales for purposes of the exemption. *See, e.g., Resnick v. M & R Baking Co.*, 1970 WL 2793, *1 (E.D. N.Y., Aug. 6, 1970) ("inquiry into the quantum of non-sales activity [cannot] help where, as here, it is incidental

to and in conjunction with the plaintiff's own outside sales and solicitations.") (opinion included at "Appendix").

Petitioners argue that, because merchandising duties are non-exempt when performed by merchandisers but are exempt when performed by Petitioners, the result is "anomalous." (Petitioners' Brief p. 15). Yet the regulations clearly contemplate that "promotional" duties (which are analogous to "merchandising" in almost all respects) can be and often are performed by both exempt and non-exempt employees. Section 541.504 of the regulations is, in fact, a lengthy discussion which attempts to distinguish "promotion work" performed by an individual who then attempts to or does consummate a sale, from the same work performed by an individual who does not himself make a sale. *See, e.g.,* 29 C.F.R. §541.504(a). In the former case, but not the latter, the work is exempt. *See generally Hodgson v. Krispy Kreme Doughnut Co.,* 346 F. Supp. 1102 (M.D. N.C. 1972) (acknowledging that "merchandising" duties were integral to customer satisfaction and goodwill and, consequently, to increasing plaintiffs' sales). Petitioners' sole argument for overturning the decision below – that the result reached by the Court of Appeals is contrary to the intent of the FLSA and the Secretary of Labor's regulations – is defeated by the plain, unambiguous language of the regulations themselves, and must be disregarded.

Petitioners desire the Court to accept the dictionary definition of "incidental," thereby disregarding the definition created by the Secretary of Labor in the specific context of the outside salesman exemption. Making sales was Petitioners' primary duty: they traveled to more than

25 to 35 stores on a given day, making a sale at each one and trying to increase the volume of Coca-Cola product in the store. They testified that the reason they performed merchandising tasks was for the purpose of enhancing sales. The Secretary of Labor unequivocally accepts that such duties, when performed by the person who makes the sale, are "incidental to and in conjunction with" the sale. The Court of Appeals' interpretation of the regulations as applied to the facts of this case were consistent with the FLSA and the purposes for which it was enacted.

C. The Court of Appeals' interpretation of the regulations and guidance of the Secretary of Labor was correct. Petitioners cite no precedent nor offer an acceptable analysis for finding the Court of Appeals' legal holdings in error.

Petitioners do not argue that the Court of Appeals applied the wrong facts. They do not argue that the holding of the Court of Appeals is in conflict with any prior opinion of that court or any other federal court or state court of last resort. They do not argue that the applicable regulations and interpretive guidance of the Secretary of Labor are arbitrary and capricious, nor did they do so at the trial or appellate stage of the proceedings. Rather, they challenge the Court of Appeals' application of the Secretary's rules, arguing that their application "renders" the regulations arbitrary and capricious. However, Petitioners' argument rests entirely on fallacious reasoning.

Their primary objection to the Court of Appeals' opinion is that, under its reasoning, "Respondent could

give each of its employees a sales pad, call them outside salesmen, and ask them to stop by their local 7-11 on their way home to pick up an order," and thus claim these employees to be exempt. (Petitioners' Brief 18-19). This argument is ridiculous. It misinterprets both the analysis of the Court of Appeals and the effect of its holding. The essential fact of this case, and of the holding of the Court of Appeals, is that there is and was absolutely no dispute that Petitioners were hired for the purpose of making sales, that their primary duty was sales, and that they were regularly and customarily employed away from Respondent's place of business in making sales. While the theoretical scenario created by Petitioners clearly presents a valid question as to whether the fictitious employees would be "employed for the purpose of and . . . customarily and regularly employed away from his employer's place or places of business in . . . making sales . . . ," there was never any such question before the Court of Appeals in the present case. (Petitioners' Appendix A, Court of Appeals' Opinion pp. 8, 10).

The holding of the Court of Appeals began with the undisputed fact that Petitioners' primary duty was sales, and then properly moved on to the only question at issue: whether merchandising tasks were "incidental to and in conjunction with" their sales. Far from rendering the outside salesman exemption "meaningless," (Petitioners' Brief p. 16), the Court of Appeals' interpretation is decided upon careful consideration of the applicable law; specifically, the regulations and guidance created by the Secretary of Labor, at 29 C.F.R. §541.5 and 29 C.F.R. §541.500, et seq.

Petitioners argue that the outside salesman exemption was not intended to allow employers to "manipulate" the distinction between exempt and non-exempt employees. However, there was no finding of intent by either the district court or the Court of Appeals, and to the extent this alleged factor was not a basis for any finding in the case below, it is irrelevant. Again, Petitioners attempt to create a theoretical scenario which not only does not exist, but *cannot* exist.

The "important federal question" which Petitioners attempt to create does not exist. Unless an employee meets the "primary duty" test of the outside salesman exemption, the other issues encompassed in the definition of outside salesman never arise. The Court of Appeals never absolved an employer from proving the "primary duty" element of the exemption, and it was in fact a pivotal basis for its decision. The Court of Appeals applied the plain language of the applicable laws, regulations and guidance, and Petitioners can point to no contrary precedent or reason to overrule the application. Their entire argument is a red herring. As it is the sole basis for their claim that the Court of Appeals' application of the correct law to the correct facts somehow *results* in the regulations being "arbitrary and capricious," the argument should not be considered.

D. Respondent met its burden of proof of demonstrating that Petitioners were exempt from the overtime requirements of the Fair Labor Standards Act.

The testimony of the three Petitioners who testified at trial was stipulated as being representative. Petitioners

make the bald assertion that Respondent failed to meet its burden of proof on the outside salesman exemption. Their argument is, more precisely, that Respondent "did not refute by 'clear and unmistakable evidence,' the fact that employees in this suit spent up to 65% of their time performing non-sales functions for Respondent." (Petitioners' Brief p. 20). This is an erroneous statement of the burden of proof.

All of the elements of the outside salesman exemption, with the sole exception of the "20% non-exempt work" element, were undisputed. The regulations state that duties which are "incidental to and in conjunction with" sales are non-exempt. There is no requirement that an employer show that 65% of an outside salesman's time is not "non-sales," but only that the employee in question does not spend more than 20% of his or her time in non-exempt duties. The focus is not whether the duties are "non-sales," but whether the duties are exempt. Respondent's burden, therefore, was solely to show that merchandising duties performed by Petitioners were incidental to and in conjunction with their sales. The Secretary of Labor finds "merchandising" tasks to be incidental to and in conjunction with sales when performed by an individual who sells. The Court of Appeals engaged in a thoughtful and thorough consideration of those rules, and concluded that Respondent had met its burden of proof. The Court of Appeals reached the correct decision.

CONCLUSION

Petitioners' proposition that the result reached through the application of the correct law to the correct facts rendered the wrong result is insufficient grounds for the grant of a writ of certiorari. There is no conflict between the decision of the Court of Appeals and that of any other United States court of appeals, any state court of last resort, or this Court. There is no important question of federal law that this Court should decide, and the petition should be denied.

The Court of Appeals applied the correct law and facts and reached a decision wholly consistent with and supported by the Secretary of Labor's regulations and guidance. Respondent respectfully requests this Court to deny Petitioners' petition for a writ of certiorari, to dismiss the action, and to award Respondent costs and expenses.

Respectfully submitted,

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19 Wage & Hour Cas. (BNA) 811, 63 Lab.Cas. P 32,370
(Cite as: 1970 WL 2793 (E.D.N.Y.))

Bernard Resnick, Plaintiff

M & R Baking Company, Inc., Defendant.

No. 60-C-769

United States District Court, E.D. New York

August 6, 1970

DOOLING, D.J.

#1 Plaintiff, who in the period in question, was a baked goods routeman employed by defendant, sues for overtime pay under the Fair Labor Standards Act, 29 U.S.C. § 207. Defendant moves for summary judgment on the stipulated facts and plaintiff's deposition testimony on the ground that plaintiff was not covered by the Act because he was, within the meaning of the Act, 29 U.S.C. § 213(a)(1), an "employee employed . . . in the capacity of outside salesman (as such terms are defined and delimited . . . by regulations of the secretary . . .)." The directly relevant regulations of the Secretary appear at 29 C.F.R. §§ 541.5, 541.500, 541.505 (particularly at (b) seventh sentence), and 541.506.

The stipulated facts, deposition of plaintiff and the exhibits (including the labor contract) make out a very strong showing that plaintiff, as a driver salesman, came within the exemptive language of Section 541.505(b):

> "Thus, there is little question that a routeman who provides the only sales contact between the employer and the customers, who calls on customers and takes orders for products which he delivers from stock in his vehicle or procures and delivers to the customer on a later trip, and

> who receives compensation commensurate with the volume of products sold, is employed for the purpose of making sales."

Plaintiff has wholly failed to meet the showing so put forward. To argue that plaintiff was simply a delivery man regularly distributing products to established customers in fixed contractual or other pre-established amounts (like the city milkman) is to ignore the entire background of fact and the manifest care and discrimination with which the regulations have defined the exempt and non-exempt classes of driver salesmen. See Section 541.505 particularly subdivisions (b), (f); Wirtz v. Golden Cream Do-Nut Co., D.C.Colo.1968, 58 LC ¶ 32,098. Overwhelming here is the interpretative significance of the entire agreement over the years among employer, employees and Union that defendant's routemen are in the exempt class. Nor can inquiry into the quantum of non-sales activity help where, as here, it is incidental to and in conjunction with the plaintiff's "own outside sales and solicitations." See Sections 541.5(b), 541.500(b), 541.505(c) (first and last two sentences), 541.506.

Accordingly it is Ordered that defendant's motion for summary judgment is granted and the Clerk is directed to enter judgment that plaintiff take nothing and that the action is dismissed on the merits with costs as taxed by the Clerk.